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NO. 60365-5

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DANIEL SIMMS,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 NOV 27 PM 4:53

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. THE STATE DID NOT ALLEGE ALL FACTS
NECESSARY TO SUPPORT THE FIREARM
ENHANCEMENTS IN THIS CASE

The essential-elements rule requires a charging document allege facts supporting every element of the offense and identify the crime charged. State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008) (Recuenco III) (citing State v. Leach, 113 Wn.2d 678, 689, 782 P.2d 552 (1989)). “Elements’ are the facts that the State must prove beyond a reasonable doubt to establish that the defendant committed the charged crime.” Recuenco III, 163 Wn.2d at 434 (citing State v. Johnstone, 96 Wn.App. 839, 844, 982 P.2d 119 (1999)). This rule applies to enhancements as well as substantive offenses. Recuenco III, 163 Wn.2d at 434.

To establish the enhancement imposed in this case, the State was required to establish Mr. Simms was armed with a firearm in the present case and that he had previously been convicted of an offense involving a weapon enhancement. RCW 9.94A.533(3)(d).¹ The State contends that despite the fact that the

¹ Mr. Simms does not claim the State failed to prove the enhancement beyond a reasonable doubt as the jury received a certified copy of the judgment and sentence of Mr. Simms’s prior second degree assault conviction which indicated a finding that he was armed with a firearm in the commission of that offense. Ex 27.

existence of the prior enhancement added eleven years to Mr. Simms's sentence, this fact is not subject to the essential-elements rule, because it is a a recidivist fact. Brief of Respondent at 8.

Recuenco III's application of the essential-elements rule to enhancements did not except prior convictions from its reach. The cases on which the State relies for its prior conviction exception concern the Sixth Amendment right to a jury trial . The essential elements rule does not arise from the jury-trial right, but rather is

. . . is grounded in almost identical language in the state and federal constitutions. Const. art. I, § 22 (amend. 10); U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation"). It is also rooted in due process doctrines concerning notice. U.S. Const. amends. 5, 14. See Leach, at 694-95.

State v. Campbell, 125 Wn.2d 797, 801, 888 P.2d 1185 (1995).

Indeed, Recuenco III itself makes clear its ruling is not based on a jury-trial error. The Court said:

No error occurred in the jury's findings. In fact, it was not until Recuenco was sentenced for an enhancement that was not charged nor found by the jury that any error had occurred at all. Up to that point, no basis existed for Recuenco to challenge the information, and no argument is presented to us that any defect existed in the information until the sentencing judge imposed a sentence for a crime the State never charged or asked for.

Thus, the State's reliance upon caselaw examining the right to a jury determination is of little use to the analysis.

In any event, the State has demonstrated it has no difficulty alleging recidivist facts in a charging document, or even proving those facts to a jury. The State did so in this case with respect to the charge of unlawful possession. CP 3.

The State attempts to distinguish the recidivist element of the unlawful possession statute from that in the enhancement, by contending in the former it "establishe[s] the very illegality of the behavior" whereas, according to the state, the prior conviction with an enhancement is irrelevant to imposition of the firearm enhancement in this case. Brief of Respondent at 10. First, given that it added 11 years to Mr. Simms's sentence, the existence prior enhancement is far from irrelevant. Sencond, to convict Mr. Simms of unlawful possession in the first degree the State had to, and did, prove not only the existence of a prior felony conviction but a prior serious felony conviction. Compare RCW 9.41.040(1)(a) and RCW 9.41.040(2)(a) (defining unlawful possession of firearm in first and second degree). under the State's theory of which elements it must allege in the charging document, those which establish the illegality of the possession, it would need only allege a prior felony to satisfy

the essential-elements rule with respect to the unlawful possession charge; as the possession is made illegal by the existence of any felony conviction and the nature of the prior felony only determines the length of the sentence. That the State does not truly endorse the theory it urges upon this Court is illustrated by the fact that the State alleged not only that Mr. Simms had a prior felony conviction but specifically alleged that he had a prior conviction of a serious felony; second degree assault. CP 3.

The recidivist element of the enhancement is no different from the recidivist element of the unlawful possession count. The State readily accepts the conclusion that the essential-elements rule as applied to the possession charge required the State to allege the fact and nature of the prior conviction, but draws artificial distinctions with respect to the enhancement. This Court should reject the State's argument..

2. MR. SIMMS'S CONVICTION OF UNLAWFUL
POSSESSION AND THE INCREASE IN HIS
FIREARM ENHANCEMENTS BASED UPON
HIS PRIOR ENHANCEMENT VIOLATE
DOUBLE JEOPARDY

Mr. Simms was charged and convicted of possessing a firearm after having previously been convicted of second degree assault with a firearm enhancement. CP 3, 62; Ex. 27. Mr. Simms

was charged and found to have been armed with a firearm in the commission of the assault and the robbery. CP 1-2; 56-58. As a matter of law and fact, Mr. Simms could not be subject to the doubling of the firearm enhancement in the present case without being a felon in possession of a gun and thus guilty of unlawful possession of a firearm. Therefore, the Double Jeopardy provision of the Fifth Amendment, as incorporated by the Fourteenth Amendment was violated.

The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

Accordingly, where two statutory provisions proscribe the "same offense" they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent.

Whalen v. United States, 445 U.S. 684, 691-92, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980).

Relying entirely on State caselaw, the State faults Mr. Simms for "immediately turning to the "same evidence" test of Blockburger test." Brief of Respondent at 15. "When the United

States Supreme Court decides an issue under the United States Constitution, all other courts must follow that Court's rulings." State v. Redcliffe, 2008 Wash.Lexis 1038, 9 (citing In re Habeas Corpus of Scruggs, 70 Wn.2d 755, 760, 425 P.2d 364 (1967)). Regardless of which test the State believes better suited to its purposes, the United States Supreme Court has made clear which test must apply; Mr. Simms employs that test.

In addition the State claims the Legislature has expressly stated its intent to permit the multiple punishments in this case. The State points to the language of RCW 9.94A.533 which simply directs that the court shall impose an enhancement where there has been a finding. Brief of Respondent at 12-13. That the enhancement is mandatory where there has been a jury finding may inform this Court's choice to vacate the unlawful possession count as the remedy for the double-jeopardy violation, but it is not an expresses statement to allow the multiple punishments at issue here. In addition, the State's claim that because the Legislature did not exempt this scenario from the operation of the enhancement statute, does not mean the Legislature also intended to permit the application of the unlawful possession statute. Finally, Mr. Simms does not contend the imposition of a base-level firearm

enhancement necessarily violates double jeopardy. Instead, he contends the doubling of that enhancement based upon the same predicate crime that establishes the unlawful possession count violates double jeopardy. RCW 9.94A.533 and RCW 9.41.040 are silent as to the Legislature's intent. Silence is not a "clear indication of contrary legislative intent" necessary to overcome the presumption against multiple punishments. Whalen, 445 U.S. at 691-92.

Ironically, the State's lone citation to a United States Supreme Court case supports the very argument Mr. Simms makes; that to overcome the presumption against multiple punishments there must be a clear statement of legislative intent. Brief of Respondent at 14 (citing Missouri v. Hunter, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983)) The Missouri statute at issue provided

"[Any] person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this

subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years."

(Emphasis added.) Hunter, 459 U.S. at 362 (quoting Missouri Rev. Stat. § 559.225 (Supp. 1976)). This is precisely the sort of unambiguous statement which Mr. Simms contends is required by the United States Supreme Court caselaw, and the sort of statement that is wholly lacking in this case. See Brief of Appellant at 11 n.1 (express legislative intent found in RCW 9A.52.050, burglary antimerger statute, and RCW 9A.41.042(6) pertaining to both unlawful possession of a firearm and theft of the same firearm). By contrast, neither statute at issue in this case expressly allows the use of a single prior offense to both double the length of the enhancements as well as to establish the offense of first degree unlawful possession of a firearm. In fact neither statute even mentions the possibility.

A fact overlooked by the State in its reliance upon Hunter is that both the Missouri court and the United State Supreme Court found the statutes punished the same offense, Hunter, 459 U.S. at 368, in the very manner Mr. Simms contends RCW 9.941.040 and the doubling provision of RCW 9.94A.533 do. That interpretation of

the Missouri statutes lends further support to Mr. Simms's contention that RCW 9.41.040 and the doubling provision of RCW 9.94A.533 proscribe the same offense.

RCW 9.94A.533(3)(d) requires the doubling of an enhancement

If the offender is being sentenced for any firearm enhancements . . . and the offender has previously been sentenced for any deadly weapon enhancements

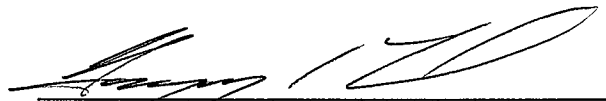
The application of this statute requires two things (1) a jury found he committed the present offense while in possession of a firearm (2) he was previously convicted of a felony involving firearm enhancement. Because a prior conviction with deadly weapon enhancement is a "serious offense" under RCW 9.41.010, there are no circumstance in which a person could be subject to the doubling provisions of RCW 9.94A.533(3)(d) without also being guilty of unlawfully possessing a firearm. A person facing the doubling provision because of a prior firearm enhancement will by definition have a prior "serious offense" pursuant to RCW 9.41.010 and will necessarily have been found to be in possession of a gun at the time of the current offense. Thus, proof of the enhancement does

not require proof of an additional fact and the imposition of both violates double jeopardy. Blockburger, 284 U.S. at 304.

B. CONCLUSION

This Court should remand for corrections of Mr. Simms's sentence to reflect the offenses charged in the Information. Alternatively, this court should vacate either the doubled enhancements or the firearm possession charge.

Respectfully submitted this 21st day of November, 2008.

A handwritten signature in black ink, appearing to read 'Gregory C. Link', is written over a horizontal line.

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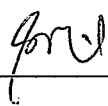
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